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November 20, 2002

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Submission by Vycera Communications, Inc. Concerning Application by SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in California, WC Docket No. 02-306

Dear Secretary Dortch:

This letter responds to statements in SBC's Reply Comments and in the Reply Affidavit of Cynthia Wales ("Wales Reply Affidavit") in connection with Vycera's comments regarding SBC Pacific Bell's abuse of its position as non-neutral primary carrier ("PC") administrator. Rather than addressing its intraLATA toll PC administration practices in response to the concerns of Vycera and other commenters, SBC Pacific Bell makes the unfounded allegation that Vycera has a "high percentage of slamming claims" when it "enters a new service market in Pacific's California service areas." However, SBC merely provides as a basis for its false assertions its own self-serving PC dispute numbers created in its capacity as non-neutral PC administrator.

In short, in response to Vycera's concerns about SBC's inflated numbers of alleged PC disputes attributed to Vycera (which result from SBC's abuse of its position as PC administrator), SBC merely proffers its own inflated alleged PC dispute numbers. Vycera contests all of the alleged percentages of "slamming complaints" and "slamming claims" that SBC attributes to Vycera in its Reply Comments and the Wales Reply Affidavit.¹

¹ For example, SBC makes a number of unsupported and false allegations in paragraph 10 of the confidential version of the Wales Reply Comments regarding the percentage of allegedly disputed interLATA toll PC change requests that Pacific Bell attributed to Vycera in 1995. SBC also claims that (according to Pacific Bell's own reporting and coding), Vycera's interLATA slamming dispute rate is higher than the average rate in Pacific Bell's service areas. Pacific Bell provides only percentages of alleged disputes that were *coded and reported by Pacific Bell*, **not** based on customer complaints filed with the California Commission or the FCC. Vycera compiled empirical evidence at the time (seven years ago) to disprove Pacific Bell's numbers, and found that substantially all of the alleged interLATA toll PC disputes had been incorrectly coded by Pacific Bell. (Vycera also had TPV records to validate each of the allegedly disputed PC changes). SBC states in paragraph 11 of the confidential version of the Wales Reply Comments that when Vycera entered the California local market, it was responsible for a percentage of all local slamming claims registered by Pacific in 1997. Once again, Pacific simply is providing its own reporting/numbers of alleged PC disputes in a circular attempt to respond to Vycera's concerns about Pacific's

As a preliminary matter, it is important to note that when SBC refers to “slamming complaints” and “slamming claims” throughout its Reply Comments and in the Wales Reply Affidavit, it refers to alleged PC disputes that *its own employees have coded/reported/recorded* as a result of their win-back calls and correspondence, and other alleged, undocumented discussions with customers. These terms as used by SBC Pacific Bell *do not refer to slamming complaints filed by customers with the California Commission or the FCC.*

In Vycera’s case, the alleged PC disputes reported by Pacific Bell were not the result of customers filing slamming complaints, informal or formal, with the California Commission or the FCC. Instead, the numbers and percentages cited by SBC in its Reply Comments and the Wales Reply Affidavit as “slamming complaints,” simply refer to SBC’s own (self-interested) “coding” and reporting of alleged PC disputes. In fact, there is no evidence or documentation that these customers ever disputed the intraLATA PCs. As SBC has acknowledged, it has registered alleged PC disputes against Vycera as a result of “manual coding errors” in processing win-back forms in cases where the customer never alleged that the PC was not authorized.² Vycera believes that the vast majority, if not all, of the alleged intraLATA PC disputes attributed to Vycera by SBC Pacific Bell are the result of Pacific Bell’s self-serving “coding.”

Vycera urged in its comments that the Commission reject SBC Pacific Bell’s request for Section 271 authority until and unless the California Commission establishes and implements a competitively neutral third-party PC administrator. Vycera also urges the Commission to adopt, at a minimum, the measures it proposed during its November 1, 2002 ex parte presentation (summarized in its November 4, 2002 ex parte filing) to prevent Pacific Bell from continuing its anticompetitive practices resulting in inflated alleged PC disputes, and to prevent Pacific Bell from abusing its PC administration functions in the interim. Grant of the requested Section 271 authority is not in the public interest if SBC Pacific Bell continues to have the opportunity to abuse its position as non-neutral PC administrator.

SBC states in its Reply Comments that “Pacific opposes the imposition of a third-party PIC administrator for the simple reason that it would complicate both the processing of carrier-change requests and **the prompt resolution of disputes.**”³ In the Wales Reply Affidavit, SBC states that Pacific opposes Vycera’s proposal for an independent third party PC administrator “because it would unnecessarily add another layer in processing carrier change requests and

reporting/manufacturing of extremely inflated numbers of alleged PC disputes. Setting aside Pacific Bell’s self-interest with respect to winning back local exchange customers, and the unreliability of Pacific Bell’s reporting, the percentage of alleged local PC disputes attributed by Pacific Bell to Vycera in 1997 is meaningless, particularly since Pacific Bell did not bother to mention the percentage of Vycera’s local service PC change requests out of all local service PC change requests submitted to Pacific Bell by all competing carriers in 1997. Pacific Bell representatives have told Vycera that it is the largest reseller of Pacific Bell’s local exchange service in California (and therefore, presumably, a competitive threat). In addition, whereas other CLECs may focus only on business markets, Vycera provides service extensively to California residential customers. It is very likely the case that in 1997 Vycera submitted a much greater percentage of local PC change requests (and a much greater percentage of residential local PC change requests) than did other carriers. Finally, Pacific Bell does not, and has not provided, Vycera with data regarding allegedly disputed local exchange carrier change requests. In summary, Vycera takes slamming and customer relations quite seriously and its PC dispute rate is very good (and certainly is no higher than the average for companies offering similar services).

² See Wales Reply Affidavit at 7, ¶ 13.

³ SBC Reply Comments at 42.

prevent the immediate resolution of disputes.”⁴ SBC Pacific Bell apparently perceives itself to be in the business of “promptly” and “immediately” resolving alleged PC disputes. (SBC Pacific Bell first creates PC disputes, then “promptly” and “immediately” resolves them by switching the customer to itself and then billing CLECs PC dispute charges.) Of course, SBC likes to have its cake and eat it too. In the Reply Affidavit of Cynthia Wales, Ms. Wales states that Pacific Bell’s tariff previously included an option whereby electing carriers could provide a copy of customer authorization to prove the validity of an allegedly disputed PC (and thereby avoid the “unsubstantiated” PC change charge). Ms. Wales goes on to explain that these options were deleted from Pacific Bell’s tariff effective November 28, 2000, because “[u]nder the Commission’s revised slamming liability rules . . . **either the Commission or the applicable state commission determines whether authorization was obtained by the carrier, not the executing carrier.”⁵**

In the case of virtually all of the alleged PC disputes attributed by Pacific Bell to Vycera, **Pacific Bell alone “resolved” the alleged PC disputes**, (and charged Vycera punitive fees as a result of its unilateral slamming determinations), in the absence of a customer complaint to the California Commission or the FCC, in the absence of any subsequent ruling by the California Commission or the FCC that a slam occurred, and without providing Vycera an opportunity to provide TPV evidence to rebut the alleged PC disputes. Pacific Bell apparently understands that **it is not permitted to determine the validity of an alleged slamming complaint**, and has revised its tariff accordingly. However, in practice, Pacific Bell continues to be the prosecutor, judge and jury with respect to alleged intraLATA toll PC disputes, and does not allow carriers any opportunity to respond to charges of alleged PC disputes by providing proof of TPV or other evidence of authorization and verification.⁶ To add economic injury to insult, Pacific Bell then charges competitors punitive fees for such alleged PC disputes, and has sole discretionary control to report inflated numbers of alleged PC disputes against other carriers to the California Commission and the FCC.

SBC states in the Wales Reply Affidavit that “[m]any subscribers respond to Pacific’s winback letters by calling our offices to report that they want to return to Pacific’s service. These are not coded as disputes unless the subscriber states that he or she did not request to

⁴ Wales Reply Affidavit at 9, ¶ 18.

⁵ Wales Reply Affidavit at 9, fn. 9 (emphasis added).

⁶ As stated in the Wales Reply Affidavit at 5, ¶ 8, “if [a] subscriber states that there has been an unauthorized change in service, Pacific representatives place a code on the change order indicating a preferred carrier dispute, and Pacific notifies the carrier alleged by the subscriber to have submitted the unauthorized change request of the dispute, in standard data exchange format.” The Affidavit conveniently omits a discussion of the steps that follow. There is no documentation that a subscriber ever stated that the change was unauthorized (just the placement of a “code” by a self-interested Pacific Bell representative); more importantly there is no evidence of a slamming complaint filed with the Commission, or a Commission decision ruling that a slam occurred. Instead, what happens next as a result of the “code” being entered by Pacific Bell’s representative is that Pacific Bell charges the allegedly unauthorized carrier a punitive fee, and reports the alleged PC dispute as a “slam” or “customer complaint” to the California Commission and the FCC – end of discussion, with no possibility under the tariff for the carrier on the receiving end to rebut the allegation and reverse the charge. (Conveniently, and in typical circular manner, SBC points to the FCC rules that do not permit the executing carrier to rule on a slamming complaint as the reason for which it eliminated the option for carriers to provide evidence to prove the validity of a PC change. Thanks to the elimination of the tariffed “prove up” or “authorization” option, SBC representatives’ “rulings” on alleged slamming complaints is a simple matter of entering a “code” on a change order.)

change his or her service from Pacific.”⁷ Pacific Bell’s representatives currently have unfettered discretion to simply “code” a win-back change request as a “dispute.” Vycera submits that Pacific Bell should not have this unfettered ability to charge its competitors a punitive “slamming” fee, under any circumstances, except where the California Commission or the FCC has ruled that a slam occurred. As Pacific Bell itself purports to recognize, only a state Commission or the FCC should be able to determine that a slam occurred, *not* a self-interested, non-neutral PC administrator. Currently, Pacific Bell has complete discretion to create slamming complaints and then promptly “resolve” the complaints with the manual stroke of a “coding” button.⁸

Vycera also notes that according to the Wales Reply Affidavit, Pacific Bell states that it has implemented a third party verification process in which it proactively asks a subscriber whether the previous change away from Pacific was unauthorized.⁹ As discussed in Vycera’s November 4, 2002 ex parte filing, Pacific Bell should not be permitted to actively solicit PC disputes in this manner. As a practical matter, this constitutes an after-the-fact attempt by Pacific Bell (the executing carrier) to verify the original change request in violation of FCC rules that prohibit executing carriers from verifying PC change requests.¹⁰ In addition, the FCC’s slamming rules prohibit carriers from including in their TPV scripts extraneous information to promote the carrier’s interests (such as information regarding preferred carrier freeze

⁷ Wales Reply Affidavit at 8, ¶ 15.

⁸ As discussed in Vycera’s November 4, 2002 ex parte letter, SBC Pacific Bell should not be permitted to register “slamming complaints” against other carriers and assess associated punitive fees in the absence of California Commission or FCC rulings that “slams” occurred in response to customer complaints filed with those Commissions. Currently, since the customers never filed complaints with the relevant Commission, Vycera and other carriers have no method by which to provide third party verification or other evidence to prove that an allegedly disputed PC change reported by Pacific Bell was authorized and verified in the first instance. It is a win-win situation for Pacific Bell, since other carriers have no means to reverse Pacific Bell’s alleged PC dispute determinations: Pacific Bell “wins back” the customer and charges the other carrier a punitive PC fee, even though no complaint has been filed and no Commission has determined that a slam occurred. Moreover, SBC has the opportunity to manipulate and abuse its position as PC administrator in ways that may target or discriminate against particular carriers. Currently nothing prevents SBC’s ability to do so.

⁹ Wales Reply Affidavit at 16, ¶ 16. It is unclear whether Pacific Bell obtained third party verification to confirm requests to switch customers back to Pacific Bell prior to April 2002. Under California law, carriers are required to obtain TPV to substantiate all residential PC change requests. To the extent that Pacific Bell did not have a third party verification process in place prior to April 2002, it would appear that all of its switch-back orders prior to April 2002 (the relevant time-frame during which Pacific Bell was manufacturing inflated numbers of alleged PC disputes against Vycera) would have been “slams” in violation of California law. Vycera notes that in a recent Order, the California Commission found that, according to a report prepared by the California Commission’s Consumer Protection and Safety Division (“CPSD”), Pacific Bell used signed letters of authorization in lieu of TPVs for the period May 1999 through October 1999 in violation of California law requiring TPVs. The CPSD report also disclosed that Pacific Bell did not always use TPVs when returning residential customers back to Pacific Bell’s service as part of its win-back program. Opinion on Slamming Complaints, CPUC Case Nos. 99-12-029 and 00-02-027, Decision 02-10-006 (October 3, 2002), at 7. Moreover, the California Commission stated that Pacific did not deny the CPSD’s report finding noncompliance with the statutory TPV requirements, and in effect conceded such noncompliance. Vycera submits that Pacific Bell is in no position to make unfounded slamming accusations against competitors such as Vycera, based merely on Pacific Bell’s own inflated alleged PC dispute numbers, while at the same time Pacific Bell itself has not complied with California TPV requirements when returning residential customers to its service as part of its win-back program.

¹⁰ 47 CFR § 64.1120(a)(2).

procedures).¹¹ Whether or not the original change away from Pacific was authorized is not properly the subject of a Pacific Bell inquiry, particularly in light of Pacific Bell's exclusive and self-interested position as non-neutral PC administrator, and given its ability to simply "code" a slamming complaint with the stroke of a key, resulting in the charging of punitive fees to the other carrier even though no slamming complaint was ever filed, and no commission ever ruled that a slam occurred.¹²

SBC claims in the Wales Reply Affidavit that Vycera has stated nothing to indicate that the inflated numbers of alleged PC disputes attributed to Vycera by Pacific Bell result from Pacific Bell's exclusive position as PC Administrator. To the contrary, Vycera explained in its Comments that it has not experienced this problem in other ILEC territories in California, or in other ILEC territories in other states, with the exception of SBC-SWBT in Texas, although Vycera utilizes exactly the same marketing and TPV scripts in every jurisdiction.

Vycera and other commenters have discussed on the record in this proceeding not only SBC's incorrect reporting of alleged PC disputes, but also SBC's manufacturing of the alleged PC disputes in the first instance, as documented by the Gietzen Win-Back letter example. (Vycera's President merely signed a win-back form to switch back to Pacific Bell; SBC then registered his account as a disputed PC against Vycera.)¹³ SBC claims that this example, (and at least 17 others during the same month), is simply an example of a "manual coding error." SBC Pacific Bell cannot be trusted with unilateral and unfettered discretion in "coding" win-back orders and other undocumented (purported) customer contacts, just as a fox cannot be trusted to watch the chickens. Vycera submits that SBC Pacific Bell should not continue to have the opportunity to make such self-serving "errors" in coding win-back reply cards and in coding other alleged conversations with customers, particularly if it is granted Section 271 authority. Unchecked PC administrator authority combined with 271 authority would allow SBC to make enough "errors" to wreak havoc on all competitive carriers in California.

Finally, SBC Pacific Bell incorrectly states in its Reply Comments and in the Wales Reply Affidavit that the Commission has already reviewed and rejected the need for a neutral third party PC administrator.¹⁴ To the contrary, the Commission has *not* rejected the need for a third-party PC administrator. While the Commission requested comment in 1997 on the need for a neutral third party PC administrator,¹⁵ the issue has been left open.¹⁶ Ms. Wales cites the

¹¹ 47 CFR § 64.1120(c)(3)(iii).

¹² Moreover, recording whether a customer states that a change away from Pacific Bell was or was not authorized in the first instance is not particularly helpful, since there is no mechanism whereby carriers such as Vycera can review the purported recordings. In any event, even if a customer states that a change away from Pacific Bell was not authorized, this is not sufficient evidence for Pacific Bell to in effect rule that a slam occurred and charge the other carrier the resulting punitive fee.

¹³ See Vycera Comments at 32-34.

¹⁴ Wales Reply Affidavit at 9-10, ¶ 18; SBC Reply Comments at 42.

¹⁵ Further Notice of Proposed Rule Making and Memorandum Opinion and Order on Reconsideration, *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act Of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers*, CC Docket No. 94-129, FCC 97-248 (rel. July 15, 1997) at ¶ 35.

¹⁶ While the FCC indicated that many commenters expressed support for the creation of a neutral third party PC administrator, the FCC declined to rule on the issue, and requested additional comment in order to more fully

Commission's First Order on Reconsideration (FCC 00-135) in CC Docket No. 94-129, issued on May 3, 2000 for the proposition that the "Commission considered the proposal to establish a third party administrator and rejected it."¹⁷ However, in that proceeding the Commission rejected a proposal for a *third-party administrator of PC complaints*, which would have left resolution of customer slamming complaints to a third-party rather than the relevant state PUC or the FCC.¹⁸ The creation of a neutral, third-party PC administrator (and all of the PC change functions related thereto) is a different proposal altogether than the creation of an independent entity to review customer slamming complaints, and the Commission has left the issue open. If a neutral third party PC administrator is created, slamming complaints still could be administered by the relevant state Commission or the FCC.

Vycera notes that at the time the Commission initially sought comment regarding the creation of a neutral third-party PC administrator in 1997, the ILECs still were neutral PC administrators with respect to interLATA toll, and the intraLATA toll markets for the most part were not yet open to competition on a presubscribed basis. While the Commission has not yet made a decision on the inquiry opened in that proceeding regarding the need for the establishment of a third party neutral PC administrator, the climate (and potential for ILEC abuse of PC administration functions) has changed significantly since 1997. Regardless, Pacific Bell's own record with respect to intraLATA toll PC disputes as documented in the California 271 proceeding is sufficient to establish the necessity to eliminate Pacific Bell's opportunity to abuse its PC administration functions.

For these reasons, and for the reasons discussed in Vycera's Comments and its November 4, 2002 ex parte filing, the Commission should restrict Pacific Bell's ability to continue abusing its position as non-neutral PC administrator as proposed in Vycera's November 4, 2002 ex parte filing, regardless whether other ILECs are subject to such restraints. The fact that SBC Pacific Bell's abuse of its position as non-neutral PC administrator is and has been the subject of ongoing California Commission inquiry makes it clear that there is a problem specific to Pacific

develop the record. Second Report And Order and Further Notice of Proposed Rulemaking, *In The Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies And Rules Concerning Unauthorized Changes Of Consumers Long Distance Carriers*, CC Docket No. 94-129, FCC 98-334 (rel. December 23, 1998) ("Second Report and Order") at ¶ 183. The FCC also reiterated in the Second Report and Order its concern that an ILEC "might attempt to engage in conduct that would blur the distinction between its role as a neutral executing carrier and its objectives as a marketplace competitor." Second Report and Order at ¶ 106. Vycera submits that SBC Pacific Bell has exploited this potential for abuse in California with respect to intraLATA toll, and there is nothing in place to prevent it from extending these practices, if granted Section 271 authority, to the interexchange market.

¹⁷ Wales Reply Affidavit at 10, Para. 18.

¹⁸ Specifically, the Commission rejected a petition filed by several IXC's seeking approval for a proposal for an industry-funded third party administrator to resolve slamming disputes (not a third party administrator for PC changes). First Order on Reconsideration, *In The Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, FCC 00-135 (rel. May 3, 2000). In rejecting the IXC's proposal, the FCC cited the fact that many LECs were not interested in participating in such a "volunteer" program. Further, NARUC had filed comments stating that the states were well-equipped to handle slamming complaints and requesting that the states be allowed to take over this function. The FCC agreed to allow the state Commissions to elect to handle slamming complaints, (while the FCC will handle slamming complaints for those states that choose not to), and thus denied the IXC's petition for a third-party slamming liability administrator.

Bell and which must be addressed before Pacific Bell may be granted Section 271 authority.¹⁹

Pacific Bell currently does not have authority to provide in-region interLATA toll service, and thus technically is not yet a “non-neutral” administrator with respect to interLATA toll PC changes (in the absence of Section 271 authority). However, if the Commission grants SBC Pacific Bell’s request for Section 271 authority, Pacific Bell would not be a neutral administrator of interLATA toll PC changes. Based on Pacific Bell’s record of abuse of its position as non-neutral PC administrator with respect to intraLATA toll in California, if granted Section 271 authority Pacific Bell could easily extend its practices to harm competition in the California interLATA toll market and by extension in the local exchange markets,²⁰ a result that would be contrary to the public interest. Through its anticompetitive practices and its abuse of its position as non-neutral PC administrator, SBC Pacific Bell has, as a practical, administrative and economic matter, pushed Vycera out of the intraLATA toll market in Pacific Bell service areas. The Commission should not grant the requested Section 271 authority unless it adopts measures to ensure that SBC Pacific Bell cannot continue and extend its practices to push competitors out of the interexchange, and by extension the local exchange markets as well.

Vycera therefore respectfully submits that the Commission should not grant SBC Pacific Bell Section 271 authority until and unless a neutral third-party PC administrator has been established and implemented in California. At a minimum, Vycera urges the Commission to adopt the protections Vycera proposed during its November 1, 2002 ex parte presentation (summarized in Vycera’s November 4, 2002 ex parte filing) to minimize Pacific Bell’s opportunity to abuse its position as non-neutral PC administrator in the interim.

Very truly yours,



Patrick J. Donovan
Katherine A. Rolph

Counsel for Vycera Communications, Inc.

¹⁹ SBC in its Reply Comments asserts that the issues raised by Vycera and other commenters including PacWest and AT&T regarding Pacific Bell’s abuse of its position as Preferred Carrier (“PC”) Administrator are merely “anecdotal,” and quotes the Commission for the proposition that it “will not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act.” SBC Reply Comments at 40. Vycera submits that this issue is neither anecdotal nor isolated, as illustrated by the Gietzen Affidavit and the results of the California Commission’s recent audit reflecting that there were problems with a “significant percentage” of Pacific Bell’s reporting of intraLATA toll LPIC disputes. California Section 271 Decision in CPUC Docket Nos. R.93-04-003, I.93-04-002, R.95-05-43, I.95-04-044 (September 19, 2002), at 260. Moreover, the California Commission recently issued an Order finding that Pacific’s process of tracking and billing intraLATA toll LPIC disputes is flawed and contributes to customer confusion, and requiring Pacific Bell to retain an independent auditor to conduct an operational audit and validation of Pacific Bell’s current process for tracking and billing intraLATA toll LPIC disputes. Opinion on Slamming Complaints, CPUC Case Nos. 99-12-029 and 00-02-027, Decision 02-10-006 (October 3, 2002).

²⁰ CLECs’ margins on the provision of residential local exchange services are slim, and many CLECs can only viably provide residential local exchange service in combination with interexchange service offerings. If CLEC/IXCs are pushed out of interexchange business, this likely would directly lead to diminished local exchange competition.